UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

WCCO-TV, Respondent, --and-- NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS - COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, Charging Party.	:	NLRB Case No. 18-CA-100535

CHARGING PARTY'S ANSWERING BRIEF

The National Association of Broadcast Employees & Technicians - Communications Workers of America, AFL-CIO ("NABET-CWA") pursuant to NLRB Rules & Regs. §102.46(d)(1) files this answering brief in response to Respondent WCCO-TV's exceptions to the decision of Administrative Law Judge ("ALJ") Arthur Amchan in the above matter. For the reasons set forth herein, and for those reasons set forth in Counsel for the General Counsel's letter brief, NABET-CWA urges the National Labor Relations Board ("Board") to reject the exceptions and affirm the ALJ's decision.

I. The Board Should Disregard the Respondent's Exceptions Because it Failed to Comply with §§102.46(b)(1) and (c)

NLRB Rules & Regs. §102.46(b)(1) provides in relevant part that each exception: 1) shall set forth specifically the questions of procedure, fact, **law**, or policy to which exception is taken; and 2) shall designate by precise citation of page the **portions of the**

record relied on. (*emphasis added).* Subsection 102.46(b)(2) provides that any exception which fails to comply with the requirements in §102.46(b)(1) may be disregarded. And §102.46(c) states that any brief in support of exceptions "shall contain no matter not included within the scope of the exceptions."

A. Respondent Failed to Cite to the Record

Respondent filed five (5) exceptions to the ALJ's finding of facts. Respondent did not file an exception to any legal conclusion or policy issue in accordance with §102.46(b)(1).

Respondent failed to designate "by precise citation of page the portions of the record relied on" in its exceptions. It cited the page and line of the ALJ's decision, but it did not cite to the portions of the record which support its exceptions. Perhaps this is because the record evidence -- the Joint Stipulation of Facts and exhibits the parties submitted to the ALJ in lieu of a trial -- does not support the Respondent's contentions. For example, in exception number 2, the Respondent excepts to the ALJ's finding of fact that the bargaining unit is described by the work performed by unit members. In the Joint Stipulation of Facts, page 4, ¶7(b), the parties, including Respondent, stipulated that "the unit is further defined by its work duties in §1.04 of the parties' most recent collective-bargaining agreement..." The ALJ's factual finding is grounded in the record evidence. Respondent's failure to cite to any contrary portion of the record demonstrates that its exception lacks merit and may be disregarded pursuant to §102.46(b)(2).

B. Respondent did not Except to any Question of Law, and the Arguments in its Brief Regarding the ALJ's Conclusions of Law Should be Disregarded

The Respondent made five exceptions to the ALJ's finding of facts, but did not file a single exception to the ALJ's legal conclusions.

As noted above, the regulations are clear: a party may not raise in its brief an issue or question "not included within the scope of the exceptions..." §102.46(c). In its exceptions, the Respondent did not file an exception to the ALJ's legal conclusion that the Board's decision in Antelope Valley Press, 311 NLRB 459 (1993) demonstrates that the Respondent bargained to impasse over a permissive subject of bargaining. Yet in its Brief, it argues this point at pages 13-15. NABET-CWA respectfully asks the Board to disregard this portion of the Brief, inasmuch as the Respondent could have, but did not, except to the ALJ's conclusions of law.

II. The ALJ Properly Found that the Bargaining Unit is Defined by the Work Performed, as the Parties Stipulated to this Fact

The Respondent's second exception states that the ALJ erred in finding as a matter of fact that the bargaining unit is defined by the work performed by unit employees.[1] As noted above, the Respondent cited the ALJ's decision, but did not cite to any portion of the record evidence in support of its contention.

[1] Respondent's first exception is to the ALJ's finding that it is an "affiliate" of CBS, rather than a wholly-owned subsidiary of CBA. This exception does not affect the ALJ's decision on the merits.

In the Joint Stipulation of Facts, page 4, ¶7(b), the parties, including Respondent, stipulated that "the unit is further defined by its work duties in §1.04 of the parties' most recent collective-bargaining agreement..." Respondent was not forced to enter into this stipulated fact. It could have gone to trial and presented evidence to support the position it now takes, that the unit is not defined by the work performed by the employees. This it did not do. Instead, it stipulated that the unit is defined by the work duties set forth in Section 1.04 of the CBA.

The ALJ's factual finding of fact that the unit is defined by the work performed by the employees is grounded in the record evidence, and the Joint Stipulation of Facts. The Respondent failed to cite to any record evidence in support of the exception. The Respondent's second exception should be rejected.

III. The ALJ Properly Followed Board Precedent

The Respondent's third exception is confusing. Respondent claims that the ALJ erred by finding as a matter of fact that "...it is for the Board, not this judge to reconsider Board precedent..." (Exception No. 3). The Respondent did not except to the ALJ's conclusion of law (that Antelope Valley Press, 311 NLRB 459 (1993) is applicable), which it could have done. Instead, it simply filed an exception to the ALJ's finding of fact that he was bound to honor Board precedent.

It is well-settled that an ALJ is required to follow established Board precedent which neither the Board nor the Supreme Court has reversed. D.L. Baker, Inc., 351 NLRB 515, *fn. 42* (2007)(Board instructs its ALJs to follow Board precedent); Pathmark

Stores, Inc., 342 NLRB 378, *fn. 1* (2004)(it remains the ALJ's duty to apply established Board precedent); Waco, Inc., 273 NLRB 746, 749 (1984)(ALJ is required to follow Board precedent); Los Angeles New Hospital, 244 NLRB 960, 962 (1979). Thus, there can be no dispute that the ALJ properly found that he was required to follow Board precedent.

Should the Board read the Respondent's third exception as an exception to the ALJ's legal conclusion that Antelope Valley Press is applicable, NABET-CWA joins in the arguments raised by Counsel for the General Counsel in her Letter Brief. The Charging Party also notes that where a bargaining unit is defined by the work done by unit employees, the Board will apply the test announced in Antelope Valley to determine whether a proposal that would allow the employer to assign unit work to non-unit employees is mandatory or permissive. 311 NLRB at 461. If an employer has insisted to impasse on inclusion of a proposal that alters the unit description, the insistence is unlawful. *Id.*

If the employer's proposal does not directly change the unit description, but adds language that would allow the employer to assign work outside of the bargaining unit (the case here), the Board "will find the employer acted lawfully **provided that the addition does not attempt to deprive the union of the right to contend that the persons performing the work after the transfer are to be included in the unit**." *Id.* The Board found the employer's proposal to be mandatory in Antelope Valley, since nothing in the proposal would bar the union from asserting that the non-unit employees belonged in the unit. 311 NLRB at 462.

In Bremerton Sun Publishing Co, 311 NLRB 467 (1993), the Board found the following proposal to modify the jurisdiction language to be permissive:

> The Employer reserves the right to assign work within the jurisdiction of the Union to any individual including non-employees. This right includes the right to assign work within the jurisdiction of the Union to any person when that work assignment is in conjunction with the introduction of new equipment.

311 NLRB at 468. An employer may not lawfully insist that non-unit employees to whom bargaining unit work is assigned must remain outside the unit. 311 NLRB at 470.

Respondent here stipulated that NABET-CWA cannot seek to represent the non-unit employees (represented by AFTRA) assigned to do our work. (Joint Stip., p. 8, ¶11(f)). *See also* Taylor Warehouse Corp., 314 NLRB 516, 528 (1994)(Respondent unlawfully insisted to impasse on proposal to assign unit work to non-unit individuals and deny the Union the right to assert that those employees could be in the unit, through a grievance or a Board proceeding); Raymond F. Kravits Center for the Performing Arts, 351 NLRB 143 (2007)(Board found that the employer's proposal to by-pass the Union's hiring hall and hire employees directly to do stagehand work was a permissive proposal, as the directly-hired employees were to remain outside the bargaining unit); SFX Target Center Arena Mgt. LLC, 342 NLRB 725 (2004)(employer may bargain over work assignments to non-unit employees so long as it does not insist that the non-unit employees to whom the work is assigned will remain outside the unit).

Respondent did not file an exception to the ALJ's legal conclusion that its proposal was permissive. That said, even if it had, it is clear from the Board's decisions in Antelope Valley, Bremerton, Taylor Warehouse and Kravits that an otherwise mandatory work assignment proposal will be considered permissive if it seeks to prohibit the Union from representing the employees. The Respondent did not (and could not) cite to any record evidence to show that NABET-CWA could seek to represent the AFTRA Reporters assigned to do NABET-CWA bargaining unit work.

The ALJ's finding that he was bound to honor Board precedent is accurate. Respondent did not cite to a single case to demonstrate that the ALJ should have ignored Board precedent. The Respondent failed to cite to any record evidence in support of its third exception. The Respondent's third exception should be rejected.

IV. The ALJ Properly Found that Respondent Sought to Transfer Unit Work to AFTRA-Represented Employees

In its fourth exception, Respondent excepts to the ALJ's factual finding that Respondent seeks to transfer unit work to AFTRA members, and NABET-CWA cannot assert jurisdiction over the AFTRA members. Once again, Respondent does not cite to any record evidence in support of its claim that this finding was in error. Respondent stipulated that NABET-CWA cannot "reclaim the unit work being done by the two AFTRA employees." (Joint Stip., p. 8, ¶11(f)).

In its brief in support of this exception, Respondent argues that it is NABET-CWA, not the Respondent, who is insisting to impasse on a permissive proposal. (R. Brief, p. 19). Respondent did not make an exception on this point, and the argument

should be disregarded. NABET-CWA joins in the arguments made by Counsel for the General Counsel in her Letter Brief on this point, and further notes that Respondent never filed an unfair labor practice charge against NABET-CWA.

Respondent in its Brief (at pages 20-22) (but not its exceptions) also suggests that by having agreed to the "cross-utilization" pilot program in the 2009-2012 CBA, NABET-CWA waived the right to challenge its inclusion in subsequent contracts. It claims that "Respondent is aware of no authority for the proposition that a union may unilaterally kill a contractual provision that is the result of a permissive bargaining subject." (Brief, page 21). This is incorrect.

The inclusion of a permissive bargaining subject in a CBA does not transform the subject to a mandatory one, and does not preclude either party from insisting that the permissive subject be deleted from successor CBAs. KMFB Stations, 343 NLRB 748 (2004); Laidlaw Transit, Inc., 323 NLRB 867 (1997); Sheet Metal Workers Local 263 (Sheet Metal Contractors), 272 NLRB 43 (1984).

> Once agreed to, permissive subjects of bargaining continue to exist essentially at the will of either party. Thus, although civil remedies may apply, parties to a contract may rescind any permissive term of the contract at any time without violating §8(a)(5) of the Act.

KMFB, 343 NLRB at 765. In Laidlaw, the Board found that the Respondent violated the Act by insisting to impasse on the continued inclusion of an interest arbitration clause in a successor CBA. 323 NLRB at 869. In Sheet Metal Workers, the Board reached the same conclusion, this time finding the Respondent Union in violation of §8(b)(3), for

insisting to impasse that an interest arbitration clause continue in a successor CBA. The Board agreed with the judge's conclusion that the Charging Party employer did not waive its right to contest the inclusion of the interest arbitration clause, even though the clause had been in several CBAs over an 11-year period. *See also* ServiceNet Inc., 340 NLRB 1245, 1253 (2003)(a proposal that seeks to set terms and conditions of employment after the expiration of the contract is a permissive proposal, and the Respondent's declared impasse was unlawful).

These cases were cited and analyzed in NABET-CWA's brief to the ALJ. Respondent was well-aware of the authority.

Clearly, if Respondent believed that NABET-CWA was violating the Act, it would have filed a Charge. This it did not do. Respondent's claim in its Brief that NABET-CWA cannot lawfully object to the continued inclusion of a permissive proposal in its CBA is wholly without support. Respondent's fourth exception should be rejected.

V. The ALJ Properly Found that Respondent Violated the Act

Respondent in its fifth exception excepts to the ALJ's finding of fact that it violated §8(a)(5) and (1) of the Act by bargaining to impasse over a permissive subject of bargaining.[2] Respondent once again failed to cite to any record evidence in support of its exception.

[2] In its sixth exception, Respondent takes exception to the ALJ's remedy. The remedy is appropriate given the Respondent's violation of the Act.

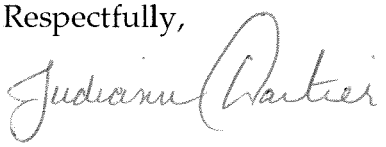
Respondent stipulated that the unit is defined by its work duties in §1.04 of the parties CBA. (Joint Stip., p. 4, ¶7(b)). Respondent stipulated that its proposal would bar NABET-CWA from representing the AFTRA members assigned to do NABET-CWA unit work under its proposal. (Joint Stip., p. 8, ¶11(f)). It further stipulated that it informed the Union that there would be no successor CBA unless NABET-CWA agreed to the permissive proposal. (Joint Stip., p. 9, ¶12(c)). Respondent stipulated that it bargained to impasse on this subject. (Joint Stip., p. 9, ¶12(f)).

The ALJ properly applied these stipulated facts to established law in the Board's decisions in Antelope Valley, Bremerton, Taylor Warehouse and Kravits. The ALJ's finding that Respondent violated the Act as alleged in the Complaint is well-grounded in fact and law, and should not be disturbed.

VI. Conclusion

For the reasons set forth herein, and on those arguments raised by Counsel for the General Counsel in her letter brief, NABET-CWA asks the Board to reject the Respondent's exceptions, and affirm the ALJ's decision and remedy.

Respectfully,



Dated: September 3, 2013

Judiann Chartier
Sector Counsel, NABET-CWA

NABET-CWA
501 Third Street NW, 6th Floor
Washington, DC 20001
(202) 434-1254

Certification

I hereby certify that on this day I filed NABET-CWA's Answering Brief with the Executive Secretary of the Board using the agency's electronic filing system. I further certify that on this day I served copies of NABET-CWA's Answering Brief upon the following via electronic mail:

Rachel Centinario, Counsel for the General Counsel
(Rachel.Centinario@nlrb.gov)

Mark Engstrom, Counsel for Respondent
(mwengstrom@cbs.com)

Dated: September 3, 2013

Judiann Chartier
Sector Counsel, NABET-CWA

NABET-CWA
501 Third Street NW, 6th Floor
Washington, DC 20001
(202) 434-1254